

# EXHIBIT 2

IN THE UNITED STATES DISTRICT COURT  
IN AND FOR THE DISTRICT OF DELAWARE

ROBOCAST, )  
 )  
-----Plaintiff, )  
 ) Case No.  
vs. ) 22-CV-305-RGA-  
 ) JLH  
 )  
NETFLIX, )  
 )  
-----Defendant. )

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ROBOCAST, )  
 )  
-----Plaintiff, )  
 ) Case No.  
vs. ) 22-CV-354-RGA-  
 ) JLH  
 )  
GOOGLE, )  
 )  
-----Defendant. )

TRANSCRIPT OF DISCOVERY CONFERENCE

DISCOVERY CONFERENCE had before the  
Honorable Jennifer L. Hall, U.S.M.J., via  
teleconference on the 29th of August, 2023.

APPEARANCES

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-and-

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Counsel for Google

1 THE COURT: Good afternoon, everyone.  
2 This is Jen Hall. We're on the line today to  
3 hear a number of discovery disputes. We have  
4 *Robocast versus Netflix*. It's 22-305. We also  
5 have *Robocast versus Google*. It's 22-354.  
6 Let's put appearances on the record starting  
7 with Robocast

8 MR. GOLDEN: Thank you, Your Honor.  
9 Good afternoon. This is Ronald Golden from  
10 Bayard PA on behalf of Robocast. I have with  
11 me on the line from McKool Smith Casey  
12 Shomaker, William Ellerman, and Samuel Moore.

13 THE COURT: Great. Good afternoon to  
14 all of you.

15 And how about Netflix?

16 MS. FARNAN: Yes, good afternoon,  
17 Your Honor. This is Kelly Farnan from  
18 Richards, Layton, and Finger on behalf of  
19 Netflix. Tyler Cragg from my office is also on  
20 the line. I'm joined by my co-counsel at  
21 Latham and Watkins Tara Elliott, Rachel Cohen,  
22 and Kimberly Li. We also have Laura Carrington  
23 from Netflix on the line, and Ms. Cohen will  
24 address the disputes before the Court today.

25 THE COURT: All right. Very good.



1 And how about in 22-304, Google?

2 DFT TWO: Good afternoon, Your Honor.  
3 Fred Cottrell from Richards Layton for YouTube  
4 and Google in 22-304. Also from my office,  
5 Griffin Schoenbaum. And my co-counsel from  
6 Wilson Sonsini, Jordan Jaffe, and Mr. Jaffe  
7 will be speaking on behalf of the defendants.

8 THE COURT: Great. That's fine. We  
9 have a court reporter on the line today.

10 I can tell you we've taken a look at the  
11 letters, and as we did so, we were reminded  
12 that we've already talked about some of these  
13 issues once this summer. Doesn't seem like  
14 we've made much progress since then, so let's  
15 see what we can get done today.

16 Let's start with the defendants'  
17 disputes. I've read the letters. Anything  
18 that Netflix wants to add to its argument about  
19 the interrogatories?

20 MS. COHEN: Hi, Your Honor. This is  
21 Rachel Cohen on behalf of Latham and Watkins  
22 for the defendant Netflix.

23 Just in terms of the first issue in  
24 dispute for Defendant Netflix and Google, it  
25 applies to them as well, in terms of the

1            numerosity dispute, Defendants -- Robocast, the  
2            plaintiff in this case, doesn't actually defend  
3            its counting at all in its responsive letter.  
4            The interrogatories at issue here were served  
5            on March 1st of this year. It's been six  
6            months, and they have not responded to a single  
7            substantive -- a single substantive response to  
8            any of the served interrogatories. They do not  
9            defend the numerosity issue.

10           And the served interrogatories are  
11           consistent with the interrogatories that are  
12           served in this court that are commonly before  
13           the court, and to the extent -- I'm happy to  
14           engage into why each one goes to the topical  
15           issue and seeks the facts and circumstances  
16           that go to the call of the question, if the  
17           Court would like, but it is consistent with  
18           practice that is consistent in this court, and  
19           I think Robocast unfortunately invites the  
20           court to start deviating from the practice, and  
21           doing so would certainly increase the number of  
22           discovery disputes in this jurisdiction.

23           THE COURT: Okay. And anything that  
24           YouTube and Google want to add just about the  
25           interrogatory number issue?

1 MR. JAFFE: Thank you, Your Honor.  
2 This is Jordan Jaffe on behalf of Google and  
3 YouTube. I won't repeat what Ms. Cohen  
4 mentioned, so I'll be brief.

5 We agree, as to Google and YouTube, that  
6 Robocast did not defend its counting in its  
7 responsive brief, so in our view the easiest  
8 way to resolve this dispute would be simply to  
9 overrule the numerosity objections because none  
10 of them have the discrete subparts, so we're  
11 substantially under the limit.

12 We think if you look at the *Megatives*  
13 case -- hopefully I'm pronouncing that  
14 correctly -- Judge Burke lays out an example  
15 where Defendants in Interrogatory 2 describe  
16 "the development efforts that relate to the  
17 alleged technologies" and goes through and has  
18 them talking about the first described in  
19 writing, first manufactured. And as Judge  
20 Burke explained in that case, those were each  
21 subsumed within the larger interrogatory and  
22 are not discrete subparts.

23 For all those reasons, we believe the  
24 subpart issue for Google and YouTube that they  
25 all are -- do not comprise discrete and

1 separate subparts that are then subsumed within  
2 the single one. That's part one.

3 And then part two, the numerosity  
4 objection, I think that Ms. Cohen mentioned  
5 we -- the better course for them would be to  
6 answer at least the 25 interrogatories rather  
7 than refuse to answer them all, and we've got  
8 the caselaw in our brief, and I'm happy to  
9 address it if the Court would like.

10 THE COURT: All right. Let's hear  
11 from Robocast on this.

12 MS. SHOMAKER: Yes, Your Honor.  
13 Casey Shomaker for Plaintiff Robocast.

14 Robocast believes in the letters that we  
15 exchanged with Netflix over the past couple  
16 months and in addition our briefing submitted  
17 in front of this Court that we've cited the  
18 caselaw that supports our position that these  
19 'rogs comprise multiple subparts.

20 As noted in our briefing, we offered  
21 compromise positions to both Google and Netflix  
22 wherein Google and Netflix could withdraw the  
23 objectionable interrogatories and thereby  
24 Robocast would comply with the law back on  
25 point in response to those interrogatories

1 without waiving numerosity objections. This  
2 was reiterated multiple times, and neither  
3 party took us up on it, and so we were forced  
4 to comply with the law and not waive our  
5 objections, so that's truly why we haven't  
6 responded to any of the interrogatories.

7 THE COURT: Are you wanting me to  
8 find that these are more than 25 that you were  
9 served? Because you didn't even argue how  
10 that's the case.

11 MS. SHOMAKER: Yes, Your Honor. So  
12 these are multiple -- both Google and Netflix  
13 served multiple interrogatories, more than 25  
14 interrogatories. With respect to Google,  
15 Google served -- exceeded the 25-interrogatory  
16 limit when they served Interrogatory Number 12,  
17 and so the -- our responses to interrogatories  
18 1 through 11 were pending when they served  
19 their final interrogatory; therefore, there  
20 were more than 25 pending interrogatories at  
21 the time. And Netflix only served one set of  
22 interrogatories, and each one in that entire  
23 set included more than 25 interrogatories and,  
24 in fact, 45 discrete subparts.

25 THE COURT: Okay. We've got a lot to

1 get through today, so I'll keep my ruling  
2 brief.

3 I disagree with how Robocast has handled  
4 this, both in terms of how it responded to the  
5 parties and particularly with respect to its  
6 position against Google, who even Robocast  
7 agrees did not serve more than 25  
8 interrogatories.

9 How long have these interrogatories been  
10 pending?

11 MS. SHOMAKER: Six months for  
12 Netflix. Nearly six months. September 1st  
13 will be six months, Your Honor.

14 THE COURT: Okay. And then just,  
15 again, a third thing of the reasons I disagree  
16 with how Robocast handled this was in its  
17 briefing to this Court, there's no attempt made  
18 to even provide the Court with how it counted  
19 or why it's appropriate, basically putting the  
20 burden on the Court to expend time and  
21 resources.

22 So Robocast needs to respond to all of  
23 the interrogatories within one week to both  
24 parties. These have been pending a long time.  
25 You should know what the answers are. I don't

1 think I have anything more to say on that.

2 Netflix has a couple other issues.

3 MS. COHEN: This is Rachel Cohen  
4 again for Netflix. The second issue is  
5 Robocast's deficient Rule 26(a) disclosures as  
6 it relates to damages.

7 So as the plaintiff in this case,  
8 Robocast has an obligation under Rule 26,  
9 consistent with Judge Andrews' decisions in the  
10 *NexStep* case as well as the *Conflow* case, to  
11 identify -- it respectfully requires initial  
12 computation and disclosure of the evidence that  
13 Robocast will rely upon, to the full extent  
14 that it can or should know of it.

15 We were happy to see that for the first  
16 time after months of going round and round on  
17 their good-faith basis for asserting lost  
18 profits that they finally acknowledged to the  
19 Court that it can't or won't pursue lost  
20 profits in this case, and that's a start, but  
21 it really doesn't solve the disclosure of what  
22 they actually do intend to seek in terms of a  
23 reasonable royalty.

24 The -- under the Court's the prior law  
25 that I just cited to, they do have an

1 obligation to explain what they can and do  
2 know, and those include, Your Honor, among  
3 other things, an explanation of how the  
4 licenses directed to the patents-in-suit -- at  
5 least one has been previously licensed -- how  
6 do those three licenses play into their damages  
7 theories in this case, their terms of the  
8 license, the duration, the licensing package of  
9 the patentee. That's *Georgia Pacific* factor  
10 number four.

11 *Georgia Pacific* factor number five talks  
12 about the relationship between the patentee and  
13 accused infringer. Notwithstanding our efforts  
14 for the last six months to get discovery from  
15 Robocast, they refused to identify any of that  
16 information, which was squarely in their  
17 possession. They know if they have a competing  
18 product or patent infringing product. They  
19 know if the parties are competitors. That's  
20 information that they possess and that, under  
21 Rule 26, they have an obligation to disclose  
22 and they've been withholding.

23 They also have attempted to shift the  
24 burden to seek discovery from Netflix before it  
25 can disclose information that's solely in its



1           possession, and that's wrong based on the law  
2           we obviously cite to in our papers.

3           THE COURT: All right. Let me hear  
4           from Robocast.

5           So you agree, don't you, that you need to  
6           update your Rule 26 disclosures immediately,  
7           given the fact that you have now said that you  
8           are not seeking lost profits, do you not?

9           MR. ELLERMAN: Your Honor, this is  
10          Will Ellerman for Robocast. We have already  
11          done that. We have already updated our Rule 26  
12          disclosures to clarify we are not seeking lost  
13          profits.

14          THE COURT: I don't have the current  
15          version of the disclosures in front of me?

16          MR. ELLERMAN: No, Your Honor.

17          THE COURT: When were those updated?

18          MR. ELLERMAN: Sometime last week  
19          before the briefing on this.

20          THE COURT: So how am I supposed to  
21          determine whether or not your current  
22          disclosures are good enough if I don't have  
23          them?

24          MR. ELLERMAN: Well, Your Honor, I  
25          believe Netflix included the -- at least one

1 version of the disclosures in their letter  
2 since this was their issue, and what we did was  
3 delete the reference to lost profits. And so  
4 our disclosures, as they stand today, seek  
5 reasonable royalty damages. We have complied  
6 with Rule 26 to the best of our ability in that  
7 regard.

8 The *NexStep* case that Netflix cites, you  
9 know, that case is, number one, distinguishable  
10 because that struck a new damages theory that  
11 was disclosed for the first time on the eve of  
12 trial, and the case says that all a claimant  
13 has to do, its only obligation, is to disclose  
14 information about its damages to the best of  
15 its ability. And Netflix has not given any  
16 reason or any authority that would require  
17 Robocast to give a damages calculation at a  
18 time when Netflix has given us virtually no  
19 financial discovery whatsoever.

20 And as we cited in our papers, Your  
21 Honor, the advisory committee notes to this  
22 rule cite a patent case as the example of when  
23 a plaintiff is simply not able to provide a  
24 complete damages disclosure at the outset of a  
25 case because all relevant information is in the

1 defendant's possession. And we may be getting  
2 a little bit ahead of ourselves into some of  
3 the other issues here, but Netflix's production  
4 to date is woefully inadequate.

5 THE COURT: I'm going to stop you  
6 right there. I'm looking right now at Exhibit  
7 G to Netflix's letter. And so what you're  
8 saying is you deleted out the paragraph on page  
9 six that talks about lost profits, but you  
10 still have in there the reasonable royalty  
11 paragraph that says that the analysis you're  
12 going to use is the hypothetical negotiation  
13 and that you've got licenses with Microsoft and  
14 Apple and that you're also going to look at  
15 licenses produced by Netflix, and you're going  
16 to come up with a royalty rate. Is that  
17 essentially what it says?

18 MR. ELLERMAN: That's correct, Your  
19 Honor, and we've --

20 THE COURT: Okay. So under the  
21 circumstances here, I'm going to hold that  
22 that's good enough for now, given that you  
23 dropped your lost profits. But again, the  
24 issue as it was presented to me was that you  
25 were seeking lost profits. You didn't drop

1           that until after they raised it, and I would  
2           have agreed with them that this wasn't enough,  
3           that you were seeking it to sue lost profits,  
4           and it shouldn't have taken a discovery motion  
5           to get this resolved.

6                     Let's move on to the next issue that  
7           Netflix has.

8                     MS. COHEN: Thank you, Your Honor.

9                     The third issue that we raised is  
10          Robocast's limitations on its document  
11          production. Throughout its submissions, and it  
12          sounds like this is where it's going again in  
13          this hearing, Robocast has represented it  
14          produced more than a million documents in this  
15          litigation. But it also acknowledges that  
16          those documents were merely a reproduction  
17          reproducing and reusing all of its submissions  
18          and exchanges from the Microsoft and Apple  
19          litigation, which both resolved in 2014. It  
20          admitted that it does not intend to produce any  
21          documents after 2014, and, obviously, the  
22          relevant damages window that it has alleged in  
23          this case is 2016 to 2020, and it has indicated  
24          to us that it has no intention of producing any  
25          documents in that window.

1           Although it argues that the materials are  
2           not relevant or somehow they believe there's no  
3           relevance to those documents, we pointed out  
4           repeatedly setting aside the lost profits,  
5           which we just discussed they dropped, those  
6           documents are also relevant to the hypothetical  
7           negotiation and the *Georgia Pacific* factors.  
8           Of course, the Federal Circuit has explained  
9           that the *Book of Wisdom* allows the parties in  
10          the hypothetical negotiation to take a look  
11          beyond the date of the hypothetical negotiation  
12          itself to inform those discussions.

13          And whether they have a practicing  
14          product, which they refuse to tell us, whether  
15          they have a product that is within the scope of  
16          the claims, whether the parties competed, all  
17          of that information is highly relevant, both at  
18          the time of the hypothetical negotiation and in  
19          the window of the alleged damages of 2016 to  
20          2020. And those are highly relevant both in  
21          terms of damages as well as claim scope,  
22          liability, and infringement, as well as  
23          invalidity in this case. We do believe we have  
24          shown they're relevant.

25          In terms of the burden, they said they're

1 standing on the fact they say it's unduly  
2 burdensome to even look for those documents  
3 because they might be privileged. We take  
4 issue with that as well, Your Honor, and that  
5 gets into the second issue or second part of  
6 the dispute, which is documents relating to  
7 funding and financing, which is a component but  
8 not the sole dispute that relates to the  
9 untenable position they've taken in this case.

10 As it relates to the funding and  
11 financing issue, it's Robocast that took the  
12 position before this Court just last year that  
13 litigation is a big piece of Robocast's  
14 business and raising capital to finance its  
15 litigation efforts is part of its business  
16 strategy. That is consistent, Your Honor, not  
17 only with its opposition to its motion to  
18 transfer in the Google case, but it's also  
19 consistent with their production to date. If  
20 they look back at their pre-2014 production,  
21 those do show that they produced documents in  
22 the prior litigation relating to their  
23 licensing and enforcement efforts, and that  
24 undermines their assertion here that those  
25 documents are somehow privileged and unduly

1           burdensome to so log.

2           Of course, if they want to assert  
3           privilege, they have the burden as the  
4           plaintiff and the holder of the alleged  
5           privilege to prove that those documents are  
6           privileged by, at a minimum, logging those  
7           documents, which we believe are highly relevant  
8           to the case, and shouldn't bar them doing a  
9           reasonable search for materials that are highly  
10          relevant to this case, and they are on the  
11          damages issues as well as liability.

12           THE COURT: All right. Thanks very  
13          much. Let's turn it over to Robocast.

14           Let's focus right now, if we could, on  
15          your production to them. You can make your  
16          argument about why their production is  
17          deficient in a second. Let's just focus on  
18          what they want from you. What is your position  
19          on documents post-dating 2014? That you don't  
20          have any? That you don't have any that aren't  
21          privileged? Or they're not relevant? What's  
22          the exact position?

23           MR. ELLERMAN: Sure, Your Honor.  
24          Will Ellerman again.

25           First of all, Robocast has produced over

1 a million documents. That's over 4 million  
2 pages. 155,000-some-odd of those documents are  
3 e-mails. The only justification that Netflix  
4 has given for documents post-dating 2014 is  
5 that it's somehow relevant to a hypothetical  
6 negotiation. They have not explained how it  
7 could possibly be relevant to a hypothetical  
8 negotiation that would have occurred years  
9 before 2014.

10 The hypothetical negotiation date in this  
11 case predates the damages period, which is 2016  
12 to 2020. It would have occurred way more than  
13 six years ago. We don't know exactly when the  
14 hypothetical negotiation occurred because  
15 Netflix has not given us sufficient  
16 documentation to pin that down. But my point  
17 is to the extent they say it's relevant to the  
18 hypothetical negotiation, we need to dig  
19 further back in time than 2014 because it  
20 appears, in all likelihood, that the playlist  
21 feature that's accused was probably introduced  
22 sometime in 2012 or earlier.

23 But, Your Honor, as far as what Robocast  
24 has, there's nothing -- we -- first of all,  
25 we -- Robocast has never taken the position



1           that it's not going to turn over a relevant  
2           document that may have been created after 2014  
3           that's somehow relevant to the time period in  
4           this case. But the fact of the matter is  
5           Robocast is not a big company --

6                       THE COURT: That's exactly the  
7           opposite of what they say. You have not taken  
8           the position that you won't turn over documents  
9           after 2014?

10                      MR. ELLERMAN: We have taken the  
11           position that it's unduly burdensome for us to  
12           sort through all of the privileged documents  
13           that exist during this time period in order to  
14           try to find anything that might be marginally  
15           relevant.

16                      Robocast is basically a two-man operation  
17           that's largely a holding company today. It's  
18           had no commercial activity since 2014 aside  
19           from the patent licenses that have been  
20           produced. It's had no other litigations since  
21           the Microsoft and the Apple cases concluded.  
22           So if it has anything at all, it's either going  
23           to be a massive volume of privileged  
24           information, and there may be documents related  
25           to potential litigation funding.

1           Our point is even if there was some  
2           minuscule bit of relevant information during  
3           this time period, it would be outweighed by the  
4           burden of having to log virtually every  
5           communication as privileged.

6           THE COURT: Okay. I've heard enough  
7           on this dispute. I take your point. I don't  
8           know if "ironic" is the right word, but I can't  
9           find on this record that it would be burdensome  
10          for Robocast, as the party who's bringing this  
11          suit, to produce documents. So here's what you  
12          need to do. You need to -- if the parties can  
13          agree on how a privilege log should be  
14          exchanged and they don't require  
15          document-by-document logging, that's fine. I  
16          don't know what you all have agreed on.

17          But Robocast needs to search for  
18          documents that post-date 2014 that are  
19          responsive to the request for production made  
20          by the defendant, and if those documents are  
21          responsive, they need to be produced. If  
22          they're responsive but they're privileged, they  
23          need to be logged.

24          Are there any such documents -- this  
25          question is for counsel for Plaintiff -- that

1           are -- here's what I'm trying to get at: Do I  
2           need to discuss this litigation funding issue,  
3           or are you going to claim that those are all  
4           privileged so we really don't need to talk  
5           about whether litigation funding documents are  
6           relevant?

7                       MR. ELLERMAN: Our primary objection,  
8           Your Honor, on the litigation funding documents  
9           is that they are not relevant under the  
10          authority of this Court. We've cited the Court  
11          to a couple of cases from Judge Andrews where  
12          he says funding-related documents are not  
13          relevant. Producing them gives the defendant  
14          an unfair advantage.

15                     Netflix has cited to cases that don't  
16           apply here. One case sought production of an  
17           IP insurance policy. That's not a funding  
18           document. And other Courts in the district  
19           have said that the one case that Netflix relies  
20           on, *Acceleration Bay*, does not stand for the  
21           proposition that funding documents are  
22           relevant, are always relevant. What it stands  
23           for is that, really, any document might be  
24           relevant as long as the party seeking it can  
25           establish its relevance.

1                   And here, in none of the briefing that  
2                   Netflix has submitted to this Court has it even  
3                   tried to explain how potential funding  
4                   documents might be relevant to any particular  
5                   fact in this case at all. It just says, well,  
6                   some Courts in the district require disclosure  
7                   of funding information; therefore, Robocast  
8                   must do that as well. And that's not the law  
9                   in the district. That's not what the cases  
10                  they cited to say, and we don't believe that  
11                  there's been any showing here whatsoever of  
12                  relevance for any funding documents.

13                  So we would ask -- we understand the  
14                  Court's ruling about post-2014 documents, but  
15                  we would ask that the Court carve out any  
16                  funding documents from that order.

17                  THE COURT: Here's what my ruling is  
18                  on this: I wouldn't say that I'm carving out  
19                  anything. If there's a document that is  
20                  responsive to one of Defendants' other requests  
21                  but it also talks about litigation funding,  
22                  that document is not going to be carved out.  
23                  That document needs to be logged. I'm not  
24                  going to order that litigation funding  
25                  documents need to be produced at this point,

1 but I'm also not carving them out from  
2 Plaintiff's obligation to log privileged  
3 communications.

4 Let me hear from Netflix. Is that ruling  
5 clear? Is there anything else you want to  
6 raise?

7 MS. COHEN: Your Honor, I think that  
8 covers it.

9 THE COURT: Okay. Thank you very  
10 much.

11 All right. And Google and YouTube, that  
12 covers yours as well; is that right?

13 MS. COHEN: Your Honor, sorry. This  
14 is Rachel Cohen. Just to be clear, the  
15 obligation is on Robocast to log its documents  
16 that are responsive even if they cover  
17 litigation funding, and that is consistent with  
18 its representation to the Court that its  
19 business is licensing funding, and that goes to  
20 issues such as valuation and invalidity. And,  
21 you know, we do cite multiple cases, including  
22 from Judge Andrews, that discuss the relevance  
23 of these documents. We want to make sure they  
24 are properly logged, and if they contend that  
25 they happen to be privileged, that we can have

1 a record to be able to come back to the Court  
2 if we disagree with their privilege claims.  
3 Otherwise, we run the risk of coming back here  
4 just to ask for documents that they withheld as  
5 what they contend irrelevant without our  
6 ability to challenge that.

7 THE COURT: Right. I have said that  
8 if a document is responsive both to a request  
9 that asks for documents pertaining to  
10 litigation funding as well as another request  
11 that pertains to something else -- I'm sure  
12 that you have plenty of them that also cover  
13 the litigation funding documents -- that that  
14 needs to be logged. If it solely has to do  
15 with funding and it's not responsive to  
16 anything else, they don't have to log it. It's  
17 hard for me to imagine that there would be a  
18 document that would fall into that category.

19 MS. COHEN: Thank you.

20 THE COURT: All right. Let's move on  
21 to Robocast's letter.

22 I'm a little bit challenged here.  
23 Actually, "little bit" is an understatement.  
24 I'm a lot challenged here with respect to  
25 Robocast's letter because it's asking me to

1 make some orders about production, and I don't  
2 have in front of me any of Robocast's discovery  
3 requests as required by the local rule. Can  
4 you show me where those are in the record?

5 MR. ELLERMAN: Your Honor, I don't  
6 know that we included the specific RFPs in the  
7 record, but the issues are global, so they're  
8 not something that we need to parse through  
9 individual requests to discuss.

10 THE COURT: And I would appreciate  
11 that position more if I felt like we hadn't  
12 already been here exactly on this issue and I  
13 asked you all to parse through and discuss  
14 exactly why certain requests needed e-mail  
15 discovery.

16 MR. ELLERMAN: That's what we have  
17 been -- we've been completely unable to do  
18 that, Your Honor, and we understood and  
19 appreciated the Court's statements at the last  
20 conference where you told the parties to  
21 exchange ESI custodians, have a discussion with  
22 those custodians about what they have and what  
23 might be in their e-mail, and then have a  
24 meaningful discussion with the other side and  
25 explain what they have. We've been willing to

1 do that from Robocast's standpoint, but the  
2 problem we have is although Netflix has  
3 disclosed ESI custodians, it has also in the  
4 same breath said we're not going to produce any  
5 e-mails to you no matter what.

6 So having that discussion with that  
7 predetermined outcome of they're not going to  
8 give us e-mails no matter what we say, no  
9 matter what we point to, no matter what we  
10 argue, is not productive, so what we've  
11 requested is that the Court order Netflix that  
12 it's going to have to engage in this process  
13 with the idea that at the end of the process,  
14 when it's concluded, it's going to have to  
15 produce some scope of e-mails. And we just  
16 can't break past that barrier with Netflix.

17 THE COURT: Did you get a list of ten  
18 custodians from Netflix? Is that part of the  
19 issue?

20 MR. ELLERMAN: Well, we previously  
21 got three custodians only on technical topics.  
22 We went back and forth and round and round,  
23 asked for more. We told them what topics we  
24 wanted them on. Last night -- or I'm sorry.  
25 Not last night. Friday, this past Friday, when



1 the briefing was due, they disclosed two  
2 additional ESI custodians, a corporate  
3 controller and a marketing and operations  
4 director. We had also asked for custodians on  
5 licensing and research and development. We  
6 haven't gotten those yet. We don't know if we  
7 will. But in answer to your question, we've  
8 gotten five custodians.

9 THE COURT: Let me turn it to  
10 Netflix.

11 Did you not read the default rule to  
12 identify at least ten? And you can make the  
13 argument why you don't need to produce the  
14 custodians, but you need to at least give the  
15 other side ten.

16 MS. COHEN: Hi, Your Honor. Again,  
17 this is Rachel Cohen for Netflix.

18 Your Honor, based on the June 2nd  
19 teleconference, we understood that the parties  
20 would have some flexibility to the default to  
21 disclose custodians who have the most relevant  
22 information and also discuss where the  
23 documents are actually located as it relates to  
24 the facts and issues in the case, and that's  
25 exactly what we have sought to do here.

1                   And we have disclosed now a total of  
2                   five, and we certainly would like to continue  
3                   to have a meaningful discussion with Robocast  
4                   about what they do and don't have. And as  
5                   we've repeatedly explained to them and as they  
6                   have not acknowledged during the  
7                   meet-and-confer process, that many of the  
8                   documents they seek, including sales and  
9                   financials and licensing and source code, are  
10                  materials that are actually located in  
11                  noncustodial data sources.

12                  The other issue, Your Honor, is we asked  
13                  to have a meaningful discussion as it relates  
14                  to all the ESI, and to date, they've only  
15                  disclosed two ESI custodians. And, you know,  
16                  it's just less than a year ago they represented  
17                  to the Court that they had four employees in  
18                  opposing the transfer motion for Google and  
19                  that documents would be coming from those  
20                  individuals that were located on the East  
21                  Coast, and they've been unwilling to speak with  
22                  us about those.

23                  So we've been happy to have a meaningful  
24                  discussion, but this case -- we believe, as it  
25                  relates to Robocast -- to Netflix, rather, the

1           number of custodians disclosed should be  
2           tailored to the claims and the issues that are  
3           presented here. These claims that they've  
4           acknowledged date back from over ten years.  
5           They elected not to pursue their claims when  
6           they had other litigations going. Because the  
7           cases failed, there's a very limited damages  
8           window, and it relates to just direct  
9           infringement claims. And that's one of the  
10          primary reasons why a lot of the documents we  
11          expect and have been producing are in  
12          noncustodial and not custodial data sources.

13                   THE COURT: I understand your  
14          position on that. Here's what I'll say about  
15          the number of custodians issue: I don't think  
16          that my comments during the June teleconference  
17          were unclear, and I'm looking here at page 31.  
18          It says the parties can, if they haven't  
19          already, exchange the names of ten custodians  
20          just so both sides can see it, but this doesn't  
21          necessarily mean that you have to search the  
22          e-mail for all custodians.

23                   So I know later that I talked about it  
24          could be less, but I think read in context,  
25          that more had to do with a party that might not

1           have ten employees. So everybody needs --  
2           everybody with more than ten employees needs to  
3           have ten, and maybe you can put on there that  
4           this person is unlikely to have any information  
5           in their custodial files, but you can't say, I  
6           don't think, with a straight face that they  
7           don't have any e-mails that are relevant. They  
8           might be very marginally relevant, but you have  
9           to produce them. But you need to put them on  
10          the list, and the local rule -- not the local  
11          rule. The default standard says it should go  
12          from the most likely to least likely, but let  
13          me turn to Robocast.

14                 Have you given them two people? Why  
15          haven't you given four, given that it sounds  
16          like you had more than two employees at least  
17          at some point in time that's relevant to this  
18          dispute?

19                 MR. ELLERMAN: We -- Your Honor, my  
20          understanding is we only have two employees,  
21          and we provided those two employees as our ESI  
22          custodians. And on top of that, we've already  
23          produced 155,000 e-mails in this case.

24                 THE COURT: Okay. I understand that.  
25          Did you have any more than two employees during

1 any period of time that you're asking for  
2 damages for?

3 MR. ELLERMAN: I will have to go back  
4 and double check that, Your Honor. If that was  
5 the case, we can address that.

6 THE COURT: All right. So put them  
7 all on your list. Okay. So that's the number  
8 of custodians issue.

9 With respect to e-mail discovery, I need  
10 to understand a little bit more about where  
11 we're at in the case. So I understand that  
12 we've still got documents being produced that  
13 are not e-mail documents. I understand that  
14 the deadline for substantial completion of  
15 document production isn't until November. I  
16 also understand that we didn't get document  
17 requests from Robocast for four months after  
18 the scheduling order was entered. I understand  
19 all of these things.

20 The thing that I need to know is, putting  
21 aside e-mail discovery, when do Netflix and  
22 YouTube and Google think they're going to be in  
23 a position to produce what they need to produce  
24 in this case, putting the e-mail discovery  
25 aside?

1                   And the reason why I'm asking is this:  
2                   Because I could be amenable to saying you don't  
3                   have to do e-mail discovery right now, but I  
4                   want to try to keep this case on the schedule,  
5                   so I need to know when you can produce the rest  
6                   of the stuff.

7                   Go ahead.

8                   MR. JAFFE: Your Honor, this is  
9                   Jordan Jaffe on behalf of Google and YouTube.

10                  With regard to the e-mail discovery and  
11                  the RFP issues, our situation is this: They  
12                  did not propound any RFPs until May 15, 2023,  
13                  and those were, ballpark, 56. And they were  
14                  largely duplicative and related to damages  
15                  issues.

16                  We responded to those RFPs and have been  
17                  meeting and conferring with them about those  
18                  RFPs, and they have identified no specific  
19                  deficiency in our document production regarding  
20                  those RFPs. They make blanket statements about  
21                  the number of documents we produced, but they  
22                  don't identify any specific RFP where we have  
23                  not produced sufficient documents. We also  
24                  have produced source code and made that  
25                  available for inspection as well. So that's

1           number one.

2                     And then --

3                     THE COURT: Just to make sure, your  
4           point of view is that you produced everything  
5           that they've requested?

6                     MR. JAFFE: No, not everything. We  
7           are rolling production, but they haven't  
8           identified anything that's deficient. They  
9           haven't identified anything where we haven't  
10          produced something, where we haven't produced  
11          noncustodial ESI information, and therefore, we  
12          need to go to e-mail.

13                    That goes to point two, which is we met  
14          and conferred with them on their only  
15          outstanding RFPs, and we said we don't think  
16          e-mail makes sense for these. And they haven't  
17          come back with any specifics for the RFPs that  
18          gives us guidance.

19                    And at least our understanding, in  
20          thinking about the prior teleconference with  
21          Your Honor, was let's not do this in the  
22          abstract. Let's talk about specific requests  
23          you have and whether e-mail was appropriate,  
24          and that's exactly what we've done on behalf of  
25          Google and YouTube, is gone to them and said

1           these RFPs don't make sense.

2           But just to be clear, we, on behalf of  
3           Google and YouTube, are not saying no e-mail  
4           discovery, period. At least as of now, our  
5           proposal is that it's phased, and specifically  
6           what we proposed is the parties talk to each  
7           other after the substantial completion of  
8           document production deadline and identify any  
9           issues where they think e-mail would be  
10          necessary and proportional to the needs of the  
11          case, and at that time, if there are any  
12          remaining disputes, we bring them to the Court,  
13          but that we do this in phases, where if there's  
14          a sufficient production of noncustodial  
15          information, that we don't need to go into  
16          e-mail, as opposed to Robocast's position,  
17          which is just this blanket position not even  
18          tethered to any specific request for  
19          production.

20          The last thing I'll mention before we  
21          move on, which is in our letter brief, and this  
22          is ECF 103 at Footnote 3, we noted the only  
23          allegations of indirect and willful  
24          infringement as to Google are for one of the  
25          three patents-in-suit, which is the '451



1 patent, and to the extent that those claims are  
2 dismissed, we don't believe that Robocast has  
3 made any showing that e-mail is appropriate,  
4 and we directed -- we cited our prior motion to  
5 dismiss on this point, and Judge Andrews, in  
6 denying the motion to dismiss as to the '451  
7 patent, he permitted us leave to refile upon a  
8 Federal Circuit order, which is the *In Re:*  
9 *Sellix* case.

10 That happened to come out yesterday, so  
11 we are analyzing that decision, and we plan to  
12 refile a motion to dismiss to dismiss the '451  
13 patent. If and when that happens, we don't  
14 think e-mail discovery will be appropriate at  
15 all for Google and YouTube, given the lack of  
16 indirect and willful infringement in the cases.  
17 And that's an additional reason why we think  
18 phasing is appropriate, because it will allow  
19 that motion to play out, and we may not need to  
20 get into e-mail discovery on those issues. It  
21 will give us time to have our motion be  
22 briefed.

23 THE COURT: Going back to my  
24 question, I think the answer was in there, and  
25 the answer is that you're going to be able to

1 be prepared to have completed your rolling  
2 production of responses, non-e-mail documents,  
3 by November and not earlier, and that we've  
4 still got plenty of time between November and  
5 the close of fact discovery in April to both  
6 worry about the e-mails and get all the  
7 depositions taken. Is that fair to say?

8 MR. JAFFE: On behalf of Google and  
9 YouTube, that's fair, Your Honor.

10 THE COURT: All right. Okay. Let me  
11 hear from Robocast why Google's proposal is not  
12 good enough for you.

13 MR. ELLERMAN: Sure, Your Honor.

14 First of all, I want to make clear that  
15 we don't have a dispute teed up with Google  
16 between Robocast and Google on the sufficiency  
17 or not of their document production. We're  
18 taking them at their word that they're going to  
19 roll more substantial production out between  
20 now and November.

21 That being said, we also don't have a  
22 dispute, in my mind, with Google about whether  
23 we're going to engage in e-mail discovery.  
24 They have not said we are not producing  
25 e-mails, so it's a different issue than the one

1           presented with Netflix.

2           But we do see a problem with the idea of  
3           a phased e-mail discovery process because the  
4           deadline for substantial completion of document  
5           discovery is November 17th. Under Google's  
6           proposal, we would wait until, I guess, around  
7           the first of the year to either have an  
8           agreement on the scope of e-mail discovery or  
9           come back to the Court and get an order on the  
10          scope of e-mail discovery, and then we've got a  
11          discovery deadline in April. So that would  
12          give us just a few very short months to  
13          complete discovery and conduct depositions, and  
14          we would need the e-mail discovery to be  
15          completed before we start taking depositions in  
16          this case.

17          So our fear is we're just going to get --  
18          we're going to be in a situation where there  
19          are large dumps of documents on or near the  
20          substantial completion deadline in November.  
21          Then we've got to sort out, after the holidays,  
22          all the issues with e-mail discovery and figure  
23          out what the scope of that is going to be, get  
24          the e-mails produced, and then there's  
25          virtually no time left to do discovery and take

1 all the depositions we need to take. We think  
2 if there's going to be a phasing-in of e-mail  
3 discovery, that process really needs to start  
4 now, Your Honor.

5 THE COURT: Isn't part of issue here  
6 that we lost four months due to the fact that  
7 you hadn't served requests until the summer?

8 MR. ELLERMAN: Well, I don't know. I  
9 mean, we served our requests, and there's been  
10 time to respond to those requests and start  
11 producing documents. We've not received much  
12 in the way of documents at all from Google to  
13 date. It's even worse from Netflix. We can  
14 talk about that in our next issue, but, you  
15 know, what I'm afraid is happening here is that  
16 no matter when document requests are served --  
17 and to be clear, we have served document  
18 requests on issues unrelated to damages. We  
19 served technical requests as well.

20 We -- Google and Netflix keep reiterating  
21 that their source code is available for review.  
22 The fact of the matter is we were not able to  
23 schedule source code review until right now  
24 because the protective order wasn't entered  
25 until last week. So, you know, what I'm afraid

1 is happening here is that parties, defendants,  
2 are just going to wait until closer to the  
3 November deadline and see that as a deadline  
4 when they need to produce documents instead of  
5 when document requests are due, which is  
6 30 days after the requests are served.

7 THE COURT: I've got it.

8 All right. One more question for Google,  
9 and this is really what I was trying to get at  
10 with my first question, which is given that  
11 you're not producing e-mails right now, under  
12 your proposal, you say you don't need to, is  
13 there a reason why we can't get the document  
14 production substantially complete before  
15 November 17th such that we can build in a  
16 little more time? I may be more likely to  
17 adopt your proposal if we had a little more  
18 time built in. Do you understand what I'm  
19 asking?

20 MR. JAFFE: Yes, Your Honor, and let  
21 me address one item briefly about that.  
22 Counsel for Robocast mentioned their technical  
23 RFPs. Those are not actually due until, I  
24 think, a week from tomorrow. It's not the case  
25 that there's this broad outstanding set of

1 discovery.

2 With regard to the existing RFPs, the  
3 ones that they propounded in May, I don't see a  
4 reason why we couldn't substantially produce  
5 completion to those before the deadline. That  
6 should be no problem.

7 But as they propound more and the parties  
8 need to meet-and-confer on their scope and  
9 whether they're appropriate, we can't really  
10 commit on this record to doing that when we  
11 don't even know what the RFPs are and what that  
12 universe is.

13 THE COURT: That's fair. When do you  
14 think, with respect to these documents that  
15 have already been requested, it's the end of  
16 August now, when do you think you'll be in a  
17 position to have those mostly produced?

18 MR. JAFFE: We just served  
19 supplemental RFP responses to a number of those  
20 RFPs, I want to say within the last week, and  
21 so the next step there for us is meeting and  
22 conferring with them to see if there's any sort  
23 of specific areas that they have issues with  
24 our supplemental responses on those issues.

25 Again, I'm hesitant to give a specific

1           time, but let me just kind of overarching --  
2           our understanding is we produced substantially  
3           the documents that comply with those RFPs based  
4           on our current responses, and so it would be  
5           kind of meeting and conferring with them on  
6           additional documents that they believe are  
7           appropriate in response to those RFPs.

8                       THE COURT: I think I understand what  
9           you're saying. Okay.

10                      With respect to the e-mail discovery  
11           issue, I think that Google's proposal is  
12           appropriate, and it's the proposal that the  
13           Court is going to adopt here with the  
14           understanding that there's not -- this is not a  
15           situation where Google is holding back  
16           documents to dump on November 17th. What I'm  
17           hearing is they're getting produced as they get  
18           identified and that outstanding documents are  
19           the ones that the parties are working through  
20           with respect to what's appropriate in their  
21           meet-and-confers.

22                      So okay. I'm just getting all my  
23           discovery letters organized here.

24                      All right. Let's talk about Netflix.  
25           Does Google's proposal sound okay to Netflix as

1 well?

2 MS. COHEN: So again, this is Rachel  
3 Cohen for Netflix.

4 Your Honor, while I appreciate that  
5 Google may be in the same situation in a few  
6 months down the road if and when the '451  
7 patent drops out of the case, we are in  
8 substantially different footing at the present  
9 time because the Court has already dismissed  
10 the indirect and willful infringement claims  
11 against Netflix. The only claims in this case  
12 are direct infringement. Courts have found  
13 that where there are only direct infringement  
14 claims, the damages window is limited, as it is  
15 in this case, and the patents have long  
16 expired, that e-mail discovery is not relevant.  
17 And Robocast's letter failed to identify a  
18 single substantive reason associated with its  
19 document requests that justifies e-mail  
20 discovery from Netflix. So at this juncture,  
21 we don't think any discovery -- e-mail  
22 discovery from Netflix is warranted, and we  
23 have not argued any specific reason it is to  
24 this Court.

25 THE COURT: I understand counsel's



1 point on that.

2 So the way that it's presented to me is  
3 the same dispute I think that I heard already  
4 in June. And again, I'm going to deny requests  
5 for e-mail discovery at this point because of  
6 the unique circumstances pointed out by  
7 Netflix, but I'm not going to say that this is  
8 something that can't be raised by Robocast  
9 later on when they've identified a reason why  
10 the e-mails are relevant, and I think the best  
11 way to do that is to do it along with Google's  
12 proposal as to the timing.

13 Let me just make sure for the record that  
14 I understand from Netflix where they are in  
15 terms of their document production. Go ahead.

16 MS. COHEN: So as it relates to  
17 technical RFPs, they were only served last  
18 week, so we are reviewing them and providing  
19 our -- we will provide timely responses and  
20 objections, and we will confirm the responsive  
21 information. So I want to make sure the record  
22 is clear those only just were served, so we're  
23 meeting our obligations, of course, for those  
24 and the prior ones.

25 The prior requests, as the Court has

1 already acknowledged, they were served four  
2 months after the ability to serve opening  
3 requests. They are limited to the issue of  
4 damages. We have been -- we timely served our  
5 responses and objections, and we've been  
6 rolling out production. The last three weeks  
7 alone, we made a production each week where I  
8 think nearly 4,000 documents have been produced  
9 relating to issues of Netflix's licenses, its  
10 revenue information, what drives and does not  
11 drive demand for Netflix, which is,  
12 unsurprisingly, not related to the issues  
13 products, rather its award-winning content. So  
14 we have been actively producing documents  
15 related to the damages requests that were  
16 served two months ago, and we will continue to  
17 do so.

18 I think we're similarly situated to  
19 Google with respect to the fact that we  
20 certainly have every intent to produce our  
21 responsive documents sufficiently in connection  
22 with the schedule and the substantial  
23 completion deadline for the ones that have been  
24 served to date.

25 And in terms of the source code, I do

1 want to make clear that the source code, which  
2 is the primary source of relevant information  
3 for whether or not the accused functionality  
4 infringes, has been available since April.  
5 Robocast has not reviewed it, and contrary to  
6 their representations that it relates to  
7 Netflix in particular, we said they could come  
8 look at the code consistent with the default  
9 for source code, and they have declined to do  
10 so.

11 THE COURT: Okay. Thank you.

12 Go ahead, counsel.

13 MR. ELLERMAN: This is Will Ellerman.  
14 May I respond to that?

15 THE COURT: Sure.

16 MR. ELLERMAN: First of all, let me  
17 address the source code. I touched on this.  
18 We couldn't very well go review source code  
19 because we had no provision worked out about  
20 the source code manifest and, basically, the  
21 table of contents of the source code and how  
22 that was going to be handled. We didn't get  
23 that sorted out with Netflix and Google until  
24 last week. So looking at source code before  
25 last week would have been looking for a needle

1 in a haystack. It would have been a fruitless  
2 endeavor. We understand that the code has been  
3 made available, but we've been severely  
4 restricted in our ability to view it until now.

5 I want to give Your Honor just a sense of  
6 what we have received to date from Netflix.  
7 Taking out their prior art production, we've  
8 gotten 60 documents totalling around 2,000  
9 pages before late last night, when we got a  
10 document production of a bunch of public SEC  
11 filings for Netflix. That's what it appears to  
12 be. We haven't had time to review it all yet.  
13 But to date, what they have produced in this  
14 case is 12 core technical documents, a bunch of  
15 prior art documents, public SEC filings, public  
16 news articles, and screenshots from their own  
17 website and some licensing agreements.

18 We're concerned about this. This is why  
19 we've asked Netflix for a schedule repeatedly.  
20 We've asked them when are you going to  
21 substantially produce documents. They refused  
22 to tell us. They refused to tell us the last  
23 time we met-and-conferred a week and a half  
24 ago, and then we got a dump last night of  
25 public documents.

1           Your Honor, the most frustrating thing  
2           about this, I think we heard it on the call  
3           today, is that Netflix says the bulk of its  
4           documents is going to come from non-custodial  
5           data sources. Netflix knows that, so it  
6           obviously knows what documents it has. It  
7           knows where those documents are. It has not  
8           produced them, and it will not tell us when  
9           it's going to produce them.

10           So we're concerned that we're going to  
11           get up until November 17th and then we're  
12           finally going to start getting documents and  
13           then we're going to have to look and see what's  
14           missing at that point and come back to the  
15           Court and start this all over again after the  
16           substantial completion of document discovery is  
17           over, and that's going to jam us up on getting  
18           discovery done, getting depositions done,  
19           sorting out issues of e-mail discovery, and  
20           everything else.

21           THE COURT: Understood. Understood.  
22           Let me switch it to Netflix.

23           Do you disagree with his characterization  
24           about what's been produced to date? Have you  
25           gone through and collected, for example,

1 financial documents that were requested from a  
2 non-custodial status source and produced that,  
3 and when do you expect that to be close to  
4 done?

5 MS. COHEN: Your Honor, we completely  
6 disagree with the representations of Robocast's  
7 counsel.

8 Just to level set at the very beginning,  
9 first of all, these requests were served in  
10 June. Our responses were due in July, and  
11 we've been producing since August. So we  
12 produced nearly 4,000 documents responsive to  
13 their requests, and they've produced zero  
14 documents. No documents. No e-mails from  
15 their possession other than the documents that  
16 they reproduced from the Microsoft and Apple  
17 cases.

18 So it's really interesting that they're  
19 taking issue with our production, which even  
20 though there was a four-month lag from the time  
21 we served our requests on March 1st of this  
22 year and they served their first request in  
23 June, we produced nearly 4,000 documents more  
24 than they have in the relevant window. So it's  
25 really unfortunate where we are today, and they

1 have not identified a single RFP to you or to  
2 us where they contend we haven't given  
3 responsive information for which they are  
4 seeking that we need to produce.

5 We are actively reviewing their requests,  
6 and we told them -- we gave them proper  
7 responses and objections and told them what  
8 we're producing and where we need clarification  
9 so we can meet our obligations.

10 And we told them we're producing on a  
11 rolling basis, which is exactly what we've  
12 done. It seems like they're complaining we  
13 produced documents last week and this week, but  
14 that's exactly what we told them we would do,  
15 consistent with the schedule and consistent  
16 with our conduct in this case, which is to,  
17 obviously, comply with our obligations and pull  
18 the relevant material. And that includes  
19 revenue information, licensing information, and  
20 how our products work.

21 THE COURT: Understood. All right.  
22 We've got all that on the record now. That's  
23 helpful.

24 So I will again reiterate my ruling from  
25 before, that we're not going to order any

1 e-mail discovery at this time, but I will just  
2 remind everybody on the phone that that doesn't  
3 mean that we're going to hold everything until  
4 the substantial completion deadline. Everyone  
5 needs to keep moving.

6 And I will also say this: And I get it,  
7 that it's enticing to compare the burdens on  
8 your clients versus the burdens on the other  
9 side, and it seems to be a theme in this case,  
10 and certainly Defendants are trying to paint a  
11 picture for the Court that perhaps Plaintiffs  
12 aren't so much interested in obtaining  
13 discovery as much as they are interested in  
14 causing Defendants to incur costs, and that's  
15 the picture that Defendants are trying to  
16 paint.

17 It seems to be going on on both sides,  
18 and I understand that that may be the economics  
19 of the situation in this case, but keep in mind  
20 that the Court is actually needing to decide  
21 what amount of discovery is proportional to the  
22 needs of the case in accordance with the law,  
23 so that needs to be microcomputed and I'm doing  
24 the best I can on this limited record.

25 So let's turn to Robocast's next request



1           against Netflix, which it seems like we just  
2           resolved, which has to do with the volume of  
3           documents. We discussed that on the record,  
4           and now we've got Robocast's request for an  
5           order compelling Netflix to produce responsive  
6           documents from outside the damages period.

7                     MR. ELLERMAN: Yes, Your Honor. Will  
8           Ellerman.

9                     THE COURT: -- and I'll hear what  
10          Netflix's position is.

11                    MR. ELLERMAN: So Netflix has refused  
12          to produce any documents across the board from  
13          outside the damages period, which is roughly  
14          from 2016 to 2020. Google says that it will  
15          produce documents preceding the damages period  
16          but only for prior art and comparable licenses.  
17          Netflix says no documents whatsoever. It's not  
18          going to do it.

19                    And we acknowledge the six-year lookback  
20          on discovery imposed by the Court's default  
21          order, but we also point out that that  
22          provision could be modified upon a showing of  
23          good cause, and here, we absolutely have good  
24          cause. We have necessary cause, and that's  
25          because of the unique situation of this case.

1 Documents predating the damages period are  
2 extremely relevant because the hypothetical  
3 negotiation predates the damages period.

4 The hypothetical negotiation, as the  
5 Court knows, is the date of first infringement,  
6 and we cited the Court to authority that that  
7 date can be outside the damages period. The  
8 oldest patent-in-suit here was issued in 2006,  
9 and Netflix's and Google's playlist features  
10 were introduced before 2016, which is the  
11 beginning of the damages period.

12 We don't know exactly when that  
13 hypothetical negotiation date is. It's  
14 sometime in there. We hope to find that out  
15 during discovery, but it's not just the date  
16 that we need. It's all of the relevant facts  
17 surrounding that date that the parties would  
18 have had knowledge of when they sat down at the  
19 hypothetical negotiating table. I will quote  
20 here in the Federal Circuit in the later  
21 *Dynamics* case where it said, "In considering  
22 the 15 *Georgia-Pacific* factors, it is presumed  
23 that the parties had full knowledge of the  
24 facts and circumstances surrounding the  
25 infringement at that time," at the time of the

1           hypothetical negotiation.

2           So what Netflix and Google are putting  
3 Robocast in a position of is potentially having  
4 an expert, a damages expert, trying to give an  
5 opinion about a hypothetical negotiation  
6 completely in the dark with no information from  
7 the defendant about the accused functionality  
8 during that time period and all of the facts  
9 surrounding the *Georgia Pacific* factors during  
10 that time period. So for Netflix and Google to  
11 say that we get no information that predates  
12 2016 severely hamstrings our ability to  
13 calculate a reasonable royalty in this case.

14           THE COURT: Okay. So the issue that  
15 I'm having here is you're saying you want all  
16 documents responsive that are prior to 2016,  
17 and they're saying you should have no documents  
18 prior to that date because you haven't  
19 articulated what the relevance is. Isn't it  
20 right that what I should do is order them to  
21 produce -- to go back and produce some  
22 documents to the extent that they're relevant  
23 to an issue that you just talked about, but not  
24 respond to every single document you request  
25 going back before 2016; right?

1 MR. ELLERMAN: Well, as Your Honor --  
2 Your Honor, as they -- as Netflix and Google  
3 have both pointed out, the RFP set that we  
4 served first was financial discovery, so all of  
5 that goes to damages and the hypothetical  
6 negotiation.

7 THE COURT: Okay. Here's what I'm  
8 going to say: I understand your point. I'm  
9 not going to say that your request is denied,  
10 but I'm not going to grant it at this point.  
11 And the reason why is I don't have your  
12 request. I have no basis to say what's  
13 appropriate to go back or whether there's good  
14 cause to go back. So pick the requests you  
15 want to have some discovery, and those -- and  
16 you should be able to explain to them why you  
17 need documents outside of 2016.

18 I disagree that documents from 2016 are  
19 never going to be -- prior to 2016 are never  
20 going to be relevant, but I don't understand  
21 that to be what Netflix was saying. Netflix  
22 was saying you've got to say what you want and  
23 articulate the basis for why you need it, and I  
24 agree with them on that. You can reraise with  
25 the Court. I need to have your requests.

1 MR. ELLERMAN: Your Honor, may I  
2 clarify a couple of things?

3 THE COURT: Yes.

4 MR. ELLERMAN: First of all, it has  
5 been very clear from Netflix that this is not a  
6 request-by-request issue, it's an  
7 across-the-board issue, but I understand the  
8 Court's ruling.

9 I do want to point out one thing, though,  
10 and that there are likely documents from before  
11 and after the damages period that reflect  
12 information from within the damages period, and  
13 Netflix and Google shouldn't be able to draw an  
14 arbitrary line that they're only going to  
15 produce documents that were created during the  
16 damages period. There could be documents  
17 predating the damages period that contain  
18 information like financial forecasts for the  
19 damages period or documents after the period  
20 that contain historical data about historical  
21 revenues and things like that. I don't think  
22 this bright line distinction of we're only  
23 giving you things created during the damages  
24 period is ever appropriate.

25 THE COURT: All right. Thanks for

1           that. I just said it wasn't, and that's how  
2           we're going to move forward. So talk with them  
3           about what things you want from prior to 2016,  
4           and we'll talk about what the burden is, and  
5           we'll decide if you have good cause to get it.  
6           Right now, I can't rule on this.

7           So your request to compel, to the extent  
8           it's a request to compel, is going to be denied  
9           at this point. But they understand from  
10          listening to what I said today that they need  
11          to work with you a little bit on this.

12          All right. What do we have left?  
13          Anything else that you want from Netflix?

14                 MR. ELLERMAN: I believe that is all  
15          of Robocast's issues, Your Honor.

16                 THE COURT: Okay. And anything that  
17          you want from Google?

18                 MR. JAFFE: Your Honor, this is  
19          Jordan Jaffe. I think we covered all the  
20          issues for Google, and the last one on our list  
21          was the time period issue.

22                 If I may add just one item on that, we  
23          didn't see any argument from them that  
24          information after the expiration date was  
25          relevant. They didn't make any arguments about

1           that in their brief, and so we understand that  
2           issue to be undisputed. But we take Your  
3           Honor's ruling that they can articulate the  
4           request, and we'll deal with it at that time.

5                   THE COURT: Okay. Great. I think  
6           that makes a ton of sense, and it's very  
7           reasonable.

8                   All right. Anything else anybody else  
9           wants to say before we call it a day?

10                   All right. Great. Everyone take care.  
11           Bye-bye.

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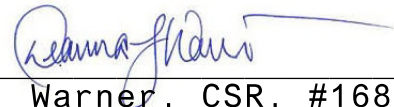
C E R T I F I C A T E

STATE OF DELAWARE                    )  
  ) ss:  
COUNTY OF NEW CASTLE            )

I, Deanna L. Warner, a Certified Shorthand Reporter, do hereby certify that as such Certified Shorthand Reporter, I was present at and reported in Stenotype shorthand the above and foregoing proceedings in Case Number 22-CV-305-RGA-JLH, *ROBOCAST* vs. *NETFLIX*, heard on August 29, 2023.

I further certify that a transcript of my shorthand notes was typed and that the foregoing transcript, consisting of 59 typewritten pages, is a true copy of said **DISCOVERY CONFERENCE**.

**SIGNED, OFFICIALLY SEALED, and FILED**  
with the Clerk of the District Court, NEW CASTLE County, Delaware, this 3rd day of September, 2023.



Deanna L. Warner, CSR, #1687  
Speedbudget Enterprises, LLC



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